

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

Baker DC, LLC
Employer

and

Case 05-RC-150123

**United Construction Workers Local
Union No. 202-Metropolitan Regional
Council of Carpenters**
Joint Petitioner

DECISION AND DIRECTION OF ELECTION

The Joint Petitioner seeks to represent a unit of all full-time and regular part-time laborers and carpenters employed by the Employer at its Washington, D.C. facility and related jobsites, where the Employer engages in the business of concrete construction. The Employer maintains that the unit sought by the Joint Petitioner is not appropriate and that the only appropriate unit must also include all foremen, equipment operators, crane operators, field engineers, project engineer helpers, drivers, welders, and concrete finishers employed by the Employer.

A hearing officer of the Board held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing.¹ As described below, based on the record and relevant Board cases, including the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), I find that the petitioned-for unit limited to the Employer's full-time and regular part-time laborers and carpenters is appropriate, and the additional classifications the Employer seeks to include in the unit do not share an overwhelming community of interest with the petitioned-for employees.

In addition, prior to the hearing, the Employer argued that approximately 40 individuals in the classifications of carpenter foreman and laborer foreman should be eligible to vote in any election that I might order. The Joint Petitioner, however, contends that the foremen are statutory supervisors under Section 2(11) of the Act, and, thus, should be excluded. As the parties raised an eligibility issue implicating a total of about 40 individuals in these two classifications, affecting at most approximately 12% of the petitioned-for unit, I concluded prior to the hearing that the issue of the supervisory status of the foremen did not significantly change the size or character of the unit, and thus was not relevant to a question concerning representation. Consequently, I instructed the hearing officer to not allow the parties to present

¹ The parties stipulated, and I find, that the labor organizations that make up the Joint Petitioner are each a labor organization within the meaning of Section 2(5) of the Act.

evidence on this issue, as I concluded that it was unnecessary to resolve these eligibility issues before the election was conducted.

I. Background and Facts

A. The Employer's Operation

The Employer is engaged in the business of concrete construction.² More specifically, the Employer installs concrete framing for commercial and residential buildings. The Employer maintains an office in Washington, D.C., as well as a facility and construction yard in Leesburg, Virginia ("the Employer's facility"). At the time of the hearing, the Employer was working on approximately 17 project sites, the great majority of which are in the Washington, D.C. metropolitan area.

The petitioned-for laborers and carpenters constitute the Employer's two largest job classifications. Presently, the Employer employs approximately 325 laborers and carpenters, about 200 of which are carpenters.³ Additionally, the Employer currently employs about 40 laborer and carpenter foremen. As discussed above, I instructed the hearing officer to not allow the parties to introduce evidence concerning the carpenter foreman and laborer foremen. Accordingly, any discussion of the petitioned-for laborers and carpenters does not relate to laborer foremen and carpenter foremen. Beyond the laborers and carpenters, the Employer currently employs just over 60 employees in job classifications it contends must be included in the smallest appropriate unit.⁴ The Employer represents that it presently employs 24 cement finishers and cement finisher foremen;⁵ 3 equipment operators; 9 tower crane operators; 2 drivers; 1 welder; 7 engineer helpers; and approximately 15 line and grade instrument men, who

² The parties stipulated, and I find, that the Employer, a limited liability company with an office and a place of business in Washington, D.C., is engaged in the business of providing construction services at various job sites in the geographic area of Washington, D.C., including portions of Virginia and Maryland, and, during the past 12 months, a representative period, performed services in excess of \$50,000 in States outside the District of Columbia. The parties further stipulated, and I find, that the Employer is engaged in commerce within the meaning of Sections 2(6) and 2(7) of the Act.

³ Carpenter apprentices have been included in this total. The Employer included carpenter apprentices on its list containing all individuals in the proposed unit, and the Joint Petitioners have not objected. See Bd. Ex. 3, Attachment B. Further, the approximately 325 laborers and carpenters listed in the Employer's Statement of Position do not include individuals who may be eligible to vote under the *Daniel/Steiny* formula.

⁴ See Bd. Ex. 3, pp. 19-22.

⁵ In Case 05-RC-135621, I determined that cement finishers and cement finisher foremen constituted an appropriate unit. After the Board denied the Employer's request for review of my unit determination, the unit employees voted in favor of representation by the Operative Plasterers and Cement Masons International Association, Local 891. There are post-election issues in that case pending before the Board. However, based on the determination in Case 05-RC-135621 that the cement finishers and cement finisher foremen constituted an appropriate unit, I precluded litigation concerning the inclusion of those classifications in the unit sought in this proceeding.

I presume are encompassed by the classification “field engineer” in the Employer’s description of what it contends to be an appropriate unit.⁶

B. Job Duties and Requirements of Relevant Classifications

The Employer-created job advertisements for laborers and carpenters set forth nearly identical job requirements, including:

- Minimum of one year of related experience and/training
- Ability to exert heavy physical effort, including carrying heavy weight
- Ability to kneel, stoop, crouch, balance, climb, or crawl.
- Ability to tolerate heights without fear.
- Ability to correctly rig and hoist material.
- Ability to signal, rig, and work safely with cranes.

Further, according to the laborer advertisement, laborers must “[w]ork with carpenter crews assisting in framing walls, columns, footing and decks.” The laborer job advertisement does not identify any other job classification with which laborers will work.

Based on the Employer’s summary of job requirements, neither carpenters nor laborers are required to hold any certification or license to obtain employment with the Employer. On the other hand, the Employer’s general superintendent, Michael Hamm, admitted that crane operators must be licensed to operate the tower crane. The record does not reveal that any petitioned-for employees are licensed to operate the tower crane. Further, the Employer’s vice president, Ken Fender, testified that drivers must maintain a commercial driver’s license (CDL). Finally, Fender also indicated that at least some equipment utilized by equipment operators requires licensing or certification. While the record indicates that other classifications, such as carpenter foremen, may periodically operate this equipment, it is unclear how many petitioned-for employees are certified to operate any or all of the Employer’s heavy equipment.

To obtain employment, field engineers must possess computer skills and have an operating knowledge of surveying software. Further, while petitioned-for employees must possess knowledge of relatively rudimentary mathematical concepts such as addition, subtraction, multiplication, and fractions, field engineers are required to be knowledgeable in trigonometry and geometry.

Regarding work locations, the petitioned-for employees work almost exclusively at the Employer’s jobsites. The same is true for the classifications that the Employer contends must be included in the unit, with two exceptions. Fender testified that the company’s lone welder works in the field between 20-25% of his work hours. Similarly, the Employer’s drivers load materials into trucks, drive trucks to jobsites, unload the materials, and return to the Employer’s facility in Leesburg after completing their delivery. When not driving, drivers work in the yard at the Leesburg facility.

⁶ Id. at p. 1. Later in the same Statement of Position, these classifications are seemingly encompassed by the classification of “[Line & Grade] Instrument Men.” For simplicity, I will use the term “field engineer” to describe engineer helpers and line and grade instrument men as a collective.

As for the actual work of the petitioned-for employees, after the necessary preparatory work at the jobsite has been completed, carpenters frame and install concrete form footings; build and install concrete wall and column forms; and build and install structural concrete deck forms, among other duties. Laborers assist carpenters in the building of the concrete frames and forms by bringing the carpenters the materials necessary to build the forms. Once the forms have been built and installed by carpenters, laborers place concrete in the formwork using wheelbarrows, rakes, and a vibrator tool.⁷ After concrete is poured into the forms built by carpenters, laborers strip and clean the formwork.

Other than transporting concrete buckets to the forms and removing the formwork once it has been stripped, crane operators do not participate in the building or installing of concrete forms, the pouring of concrete into the forms, and the cleaning and stripping of the formwork. Similarly, the extent to which field engineers and engineer helpers participate in these core Employer functions is unclear in the record.

C. Supervisory Hierarchy

I have taken administrative notice of relevant exhibits in Case 05-RC-135621, one of which sets forth organizational charts for two of the Employer's projects, both of which have similar reporting structures. At both projects, both carpenter foremen and laborer foremen—presumably encompassing the carpenters and laborers working with them—report to an area superintendent. The area superintendent then reports to the general superintendent, who in turn reports to a senior project manager.

Field engineers and crane operators, on the other hand, have a different reporting structure. Field engineers report to a lead field engineer. The lead field engineer reports to an engineering manager, who then reports to the senior project manager. Thus, the organizational chart indicates that field engineers do not report to either area superintendents or the general superintendent. Like field engineers, the crane operators do not report to area superintendents. Rather, crane operators report directly to the general superintendent.

D. Terms and Conditions of Employment

Laborers and carpenters earn similar wages and, like all employees, may select from the same benefit plans for medical and dental benefits. Laborers earn between \$12.00-\$22.00/hour, and carpenters earn between \$15.00-\$24.50/hour. The former earns an average of \$15.90/hour, and the latter earns an average of \$19.71/hour.

While drivers, welders, engineer helpers, and instrument men have similar wage ranges and average wages to petitioned-for employees,⁸ there are marked compensation differences

⁷ The Employer sometimes utilizes the crane method of transporting concrete. That is, a crane operator will use the tower crane to pick up a concrete bucket and transfers the bucket to an area of the worksite where the concrete is to be poured. See Tr. 39.

⁸ The record indicates the following wage rates: driver (\$20.35); welder (\$21.00); engineer helper (\$15.00-\$24.25); and instrument men (\$19.00-\$23.00).

between the petitioned-for employees and the crane operators and equipment operators. Crane operators earn between \$36.00-\$41.00/hour, and earn an average wage of \$38.39/hour. Operators earn between \$20.00-\$38.05/hour, and earn an average wage of \$28.34/hour.

II. Analysis

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in *an* appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996) (emphasis added). Thus, the Board first decides whether the unit proposed by a petitioner is appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit that would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an “overwhelming community of interest” with those in the petitioned-for unit. *Specialty Healthcare*, supra, slip op. at 7.⁹

A. Laborers and Carpenters are a Readily Identifiable Group and Share a Community of Interest.

1. Whether the petitioned-for unit is a readily identifiable group.

The first inquiry is whether the job classifications sought by the Joint Petitioners are readily identifiable as a group and share a community of interest. In this regard, the Board has made clear that it will not approve fractured units, specifically, combinations of employees that have no rational basis. *Odwalla, Inc.*, 357 NLRB No. 132 (2011); *Seaboard Marine*, 327 NLRB 556 (1999). Thus, it must be considered whether the employees sought are organized into a separate department or administrative grouping.

Here, contrary to the Employer’s assertions, I find that the petitioned-for unit is a readily identifiable group. The petition seeks all non-supervisory employees from two identifiable classifications that constitutes the Employer’s two largest classifications and, as discussed below, require similar skills and share a high degree of functional integration. These employees perform core functions of the Employer’s concrete construction enterprise. Further, it is clear that the petitioned-for unit conforms to operational lines drawn by the Employer. More specifically, laborers and carpenters share a branch in the Employer’s own organizational charts, and are the only classifications reporting to area superintendents. Thus, the petitioned-for unit is coextensive with a departmental line drawn by the Employer. See *Macy’s Inc.*, 361 NLRB No. 4, slip op. at 8 (2014). Accordingly, I find that the petitioned-for unit is a readily identifiable group.

⁹ The Board did not except the construction industry from its decision in *Specialty Healthcare*. Further, on October 24, 2014, the Board denied the Employer’s request for review in Case 05-RC-135621. There, the majority stated that the principles articulated in *Specialty Healthcare* were applicable to that case—a construction industry case involving the same employer as this matter. Accordingly, I shall apply the analysis set forth in *Specialty Healthcare* in this matter, as well.

2. Whether the petitioned-for unit shares a community of interest.

Having determined that the petitioned-for unit is a readily identifiable group of employees, I next turn to the second portion of the inquiry—whether the petitioned-for employees share a community of interest. In determining whether the classifications share a community of interest, the Board considers whether the employees sought by a union have distinct skills and distinct job functions, including inquiring into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002); see also *Specialty Healthcare*, supra, at 9. Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of employees' skills. *Gustave Fischer, Inc.*, 256 NLRB 1069, 1069 fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

a. Skills and Job Functions

This factor examines whether disputed employees can be distinguished from one another on the basis of job functions, duties or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that employees perform the same basic function or have the same duties, that there is a high degree of overlap in job functions or of performing one another's work, or that disputed employees work together as a crew, support a finding of similarity of functions.

Evidence that disputed employees have similar requirements to obtain employment further supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penny Co., Inc.*, 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenician*, 308 NLRB 826 (1992). Here, the Employer's advertisements for laborers and carpenters contained near-identical job requirements, including the same amount of related experience and training; ability to exert heavy physical effort; ability to rig and hoist material; and ability to signal, rig, and work safely with cranes, among other requirements. Further, neither classification is required to have specific licenses or certifications, unlike other Employer job classifications.

In sum, the record reveals that the petitioned-for employees perform separate but related functions of concrete construction, the Employer's core business. Further, laborers and carpenters share almost identical job requirements, and need not hold or maintain additional licenses or certifications for continued employment with the Employer. Accordingly, I find that this community-of-interest factor weighs in favor of finding the petitioned-for unit to be appropriate.

b. Functional Integration

Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *Transerv Systems*, 311 NLRB 766

(1993). On the other hand, if functional integration does not result in contact among petitioned-for employees, the existence of functional integration has less weight.

Here, the record reveals a high degree of functional integration. Carpenters build and install concrete forms with some assistance from laborers, who bring carpenters the materials necessary to construct the forms. After the formwork is built and installed by carpenters, laborers pour concrete into these forms. Once this process is completed, laborers then clean and strip the formwork. This cycle then repeats itself. Moreover, Fender testified that laborers and carpenters work together during the forming, reinforcing and placing concrete phase, as well as the stripping phase. It is sufficiently clear from the record that the petitioned-for employees' work constitutes integral elements of the Employer's concrete construction function. Thus, I find that this community-of-interest factor weighs in favor of finding the petitioned-for unit to be appropriate.

c. Interchange and Contact Among Employees

Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange "may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills." *Hilton Hotel Corp.*, 287 NLRB 359, 360 (1987). As a result, the Board has held that the frequency of employee interchange is an important factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit. *Executive Resource Associates*, 301 NLRB 400, 401 (1991) (citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1981)). In this case, the record reveals relatively limited evidence of employee interchange between the petitioned-for employees. Though the record is largely without evidence indicating that laborers perform work customarily performed by carpenters, the record indicates, however, that carpenters participate in the placing of concrete, which is primarily the work of a laborer. Further, carpenters assist the stripping and cleaning of framework, another primary function of laborers.

Also relevant for consideration with regard to interchangeability is whether there are permanent transfers among employees in the unit sought by a union. However, the existence of permanent transfers is not as important as evidence of temporary interchange. *Hilton Hotel Corp.*, supra. In this matter, the record reveals minimal evidence of permanent transfers between the petitioned-for classifications. There was testimony that carpenter Esau Aleman was previously a laborer, but that example is the only evidence of permanent interchange in the record. I thus apply little weight to that evidence.

Additionally, the amount of work-related contact among employees, including whether they work beside one another, is a relative consideration. Thus, it is important to compare the amount of contact employees in the unit sought by a union have with one another. See, e.g., *Casino Aztar*, 349 NLRB at 605-606. There is evidence of significant work-related contact between the petitioned-for employees. Laborers and carpenters both work almost exclusively at the Employer's jobsites. Furthermore, laborers and carpenters are frequently working side-by-side during the process of building and installing concrete forms, and the pouring of concrete into those forms.

In sum, I find this factor, specifically the significant amount of work-related contact between employees in the petitioned-for classifications, weighs in favor of finding the petitioned-for unit to be appropriate.

d. Terms and Conditions of Employment

Terms and conditions of employment include whether employees receive similar wage ranges and are paid in a similar fashion (e.g., hourly or salaried); whether employees receive the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies and other terms of employment that might be described in an employee handbook. However, the facts that employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not interchange and/or work in a physically separate are. *Bradley Steel, Inc.*, 342 NLRB 215 (2004); *Overnite Transportation Co.*, supra.

In the instant case, the record reveals that petitioned-for employees share common terms and conditions of employment. Both classifications are paid on an hourly basis. Both laborers and carpenters have similar wage ranges, and relatively similar average wages. Further, like all of the Employer's employees, laborers and carpenters may select from the same health benefit plans. While it is unknown on this record whether laborers and carpenters are subject to the same work rules and disciplinary policies, I find that record more than adequately establishes that petitioned-for employees share similar terms and conditions of employment.

e. Common Supervision

Another community-of-interest factor is whether petitioned-for employees are commonly supervised. Common supervision weighs in favor of placing the employees in dispute in one unit. However, the fact that two groups are commonly supervised does not mandate that they be included in the same unit, particularly where there is no evidence of interchange, contact or functional integration. *United Operations*, supra at 125. Similarly, the fact that two groups of employees are separately supervised weighs against their inclusion in the same unit. Separate supervision, however, does not mandate separate units. *Casino Aztar*, supra at 607, fn 11. Rather, more important is the degree of interchange, contact and functional integration. *Id.* at 607.

In this case, the record reveals that the petitioned-for employees are commonly supervised by area superintendents, the project general superintendent, and the senior project manager. If laborer foremen and carpenter foremen are not supervisors, as the Employer argues, the petitioned-for employees share identical supervision; if, however, the foremen are found to be Section 2(11) supervisors, common supervision amongst petitioned-for employees begins at the second supervisory level, and is thereafter identical. In sum, there is a strong degree of common supervision amongst petitioned-for employees.

3. Conclusion

The Employer relies heavily on the Board's decision in *Bergdorf Goodman*, 361 NLRB No. 11 (2014), but that case is distinguishable. There, the petitioner sought to represent

women's shoe sales associates in two classifications: Salon Shoes and Contemporary Shoes. While Salon Shoes was its own department, Contemporary Shoes was carved out of the employer's Contemporary Sportswear department—the remaining employees of which were not included in the petition. The Board first found that the petitioned-for unit was not readily identifiable because it lacked a relationship to any of the administrative or operational lines drawn by the employer. *Id.* at 4. Next, while noting that a strong showing of community of interest between the petitioned-for classifications “might [mitigate] or [outweigh]” that deficit, the classifications lacked common supervision and significant interchange, and had limited contact with one another. *Id.* at 3-4. Thus, the petitioner's failure to make a strong showing of community of interest could not mitigate or offset the lack of relationship between the proposed unit and the administrative and operational lines drawn by the employer. *Id.* at 4.

Here, the petitioned-for employees are a readily identifiable group conforming with operational lines drawn by the Employer, and have a strong community of interest that would, in any event, outweigh any lack of relationship between the proposed unit and the Employer's administrative and operational lines, if any such lack of relationship existed. Unlike the employees in the petitioned-for classifications in *Bergdorf Goodman* (who shared common supervision only at the store's highest level—the general manager), the laborers and carpenters in the instant case share identical supervision.¹⁰ Further, the petitioned-for employees in this matter have significant and daily contact with one another. Employees in *Bergdorf Goodman*, on the other hand, were found to have minimal contact with one another, largely limited to incidental contact in an employee locker room and cafeteria. Accordingly, I am not persuaded by the Employer's argument that the Board's decision in *Bergdorf Goodman* necessitates my finding that the petitioned-for unit in this case is inappropriate.

In sum, I find that the Joint Petitioners have carried their burden of showing that the petitioned-for unit is an appropriate unit. As discussed above, the petitioned-for employees are “readily identifiable” as a group. *Macy's Inc.*, 361 NLRB No. 4 (2014). Moreover, the petitioned-for employees share a community of interest under the Board's traditional criteria. Their work has a shared purpose and is functionally integrated. In addition, the petitioned-for unit employees possess similar job skills and functions, have significant work-related contact with each other, share similar terms and conditions of employment, and experience common supervision. *DTG Operations, Inc.*, 357 NLRB No. 175 (2011); *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163 (2011). Thus, under *Specialty Healthcare*, the burden shifts to the Employer to demonstrate that the classifications it seeks to add share an overwhelming community of interest with the petitioned-for employees.

B. Other Classifications do not Share an Overwhelming Community of Interest with Laborers and Carpenters

Regarding the second inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there “is no legitimate basis upon which to exclude (the) employees from” the larger unit because the traditional community-of-interest factors “overlap almost completely.” *Specialty Healthcare*, supra, at 11-13, and fn. 28 (quoting

¹⁰ If it is ultimately found that laborer and carpenter foremen are Section 2(11) supervisors, the petitioned-for employees nevertheless share identical supervision from the second supervisory layer upwards.

Blue Man Vegas, LLC v. NLRB, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it—in this case, the Employer. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB No. 163, slip op. at 3 fn. 8 (2011).

I conclude that the employees the Employer seeks to add to the unit do not share an overwhelming community of interest warranting their inclusion with the employees sought by the Joint Petitioners. More specifically, the record evidence is insufficient to establish that the community-of-interest factors “overlap almost completely” when comparing the petitioned-for employees and those classifications the Employer seeks to add to the unit. Indeed, there are significant and material differences between the petitioned-for unit and several of the classifications that the Employer seeks to add to the unit. Even where the differences are not as stark, the Employer failed to meet its heightened burden of establishing that any of the additional classifications share an overwhelming community of interest with the petitioned-for employees.

The record lacks evidence establishing that the drivers and welders share an overwhelming community of interest with the petitioned-for employees. First, the welder and drivers are separately supervised. Unlike the petitioned-for employees who are supervised by the area superintendents and general superintendent—if not laborer and carpenter foremen—the drivers and welder report to the Employer’s shop manager, Brad Harigan, who works overwhelmingly from the Employer’s facility in Leesburg, Virginia. Second, these classifications have limited work-related contact with the petitioned-for employees. Whereas the laborers and carpenters work predominantly in the field at the Employer’s jobsites, Fender estimated that the lone welder works approximately 80% of the time from Leesburg facility, and the record is unclear concerning the type and frequency of contact the welder has with petitioned-for employees when working in the field. Similarly, drivers load trucks with materials, drive to a jobsite, unload materials, and then return to the shop. When not driving, drivers are not in the field assisting laborers and carpenters; rather, they work on equipment and clean the yard at the Employer’s facility. Next, drivers are required to have and maintain a CDL. Laborers and carpenters are not required to hold a CDL to remain eligible for their positions. Moreover, the record lacks evidence establishing functional integration between these job classifications and laborers and carpenters. Further, the Employer failed to present evidence of temporary or permanent interchange between drivers and welders and the petitioned-for employees. Thus, based on this record, I cannot find that these job classifications and the petitioned-for employees’ community of interest factors overlap almost completely.

Next, I conclude that the Employer has not met its burden of proving that crane operators share an overwhelming community of interest with the petitioned-for unit. Crane operators earn significantly higher wages than do the petitioned-for employees. The lowest pay rate for crane operators is \$36/hour, significantly higher than the \$12/hour and \$15/hour lowest wage rates for laborers and carpenters, respectively. The average crane operator wage rate (\$38.39/hour) is nearly two-and-a-half times greater than the laborer average (\$15.90) and almost twice the carpenter average (\$19.71). In addition to vastly different wage rates, I find that the crane operators and petitioned-for employees are separately supervised. Organizational charts admitted in Case 05-RC-135621 demonstrate that crane operators do not report to area superintendents, but, rather, report directly to the general superintendent. Further, though crane operators seem to work exclusively in the field, they have limited contact with the petitioned-for

employees. According to Hamm, crane operators typically spend their entire work day in an elevated post in the tower crane, well away from the petitioned-for employees. Crane operators are required to pass a licensing exam to operate the tower crane. In contrast, laborers and carpenters need no such license to perform their job duties. Finally, while the Employer provided instances of temporary interchange, it did not establish the regularity with which crane operators perform laborer or carpenter duties. Indeed, multiple witnesses testified that they have not observed crane operators building or stripping concrete forms, the core functions performed by laborers and carpenters. Nor did the Employer present evidence that laborers and carpenters have performed—or would even be able to perform—crane operator duties. Based on these significant differences, I do not find that crane operators share an overwhelming community of interest with the petitioned-for unit.

I further find that the Employer has not established nearly complete overlap in the community-of-interest factors between field engineers—instrument men and engineer helpers—and the petitioned-for employees. First, field engineers have different terms and conditions of employment. Whereas all petitioned-for employees earn an hourly wage rate, Fender testified that several field engineers are salaried and exempt from overtime pay. Next, contrary to the Employer's contention that field engineers report directly to a general superintendent, the organizational charts submitted in 05-RC-135621 indicate that field engineers do not report to area superintendents or the general superintendent; instead, field engineers report to an engineering manager, who in turn reports to the senior project manager.¹¹ Third, field engineers must possess a different set of skills than the petitioned-for employees. Specifically, instrument men must possess an understanding of geometry and trigonometry, must have computer skills, and must have an operating knowledge of surveying equipment. Nowhere in the job description or job qualifications for laborers and carpenters are such requirements set forth. While there is some evidence of field engineers working beside petitioned-for employees, as well as instances in which carpenters may use field engineer equipment to perform their job duties, the regularity of these practices is unclear on this record.

Finally, equipment operators do not share an overwhelming community of interest with the petitioned-for unit. The Employer's Statement of Position only delineates three equipment operators. Fender testified that laborers may operate equipment at the excavation phase, though conceded that some equipment requires certification or licensing. The record lacks evidence concerning the number of laborers who are certified to operate equipment, which equipment they do operate, and how frequently. Further, operators earn a markedly higher wage than do the petitioned-for employees. On average, operators earn over \$28/hour, \$12/hour more than laborers earn, and nearly \$9/hour more than carpenters earn. Nor did the Employer establish the role, if any, that operators perform in building, installing, and stripping concrete forms. Thus, while there may be some evidence of employee interchange and contact, the evidence does not indicate that there is almost complete overlap in the community-of-interest factors between the equipment operators and the petitioned-for unit.¹²

¹¹ See Pet. Ex. 1, pp. 1-2, Case 05-RC-135621.

¹² Furthermore, were there to be a petition filed for the operators, I might conclude that such a unit was in itself an appropriate unit. *Del-Mont Construction Co.*, 150 NLRB 85 (1965). Generally, in the construction industry, a unit does not have to be a craft or departmental unit, so long as the petitioned-for employees are a readily identifiable

I acknowledge that some of the job classifications the Employer contends must be included in the unit have some functional integration insofar as crane operators, equipment operators, and field engineers all contribute in their own way to the execution of the building, installation, and finishing of concrete buildings. Furthermore, the Employer produced some evidence of interchange and contact between the petitioned-for employees and the employees in the classifications that the Employer seeks to add to the unit. While the Employer's contentions may establish that a broader unit sought by the Employer could be an appropriate unit, they are insufficient to establish that any of the specific classifications the Employer seeks to add share such an overwhelming community of interest as to *require* their inclusion in the unit. Having thus found that the Employer failed to meet its burden, I direct that an election be held covering the petitioned-for unit of employees.

As mentioned above, I previously concluded that it was unnecessary to resolve the eligibility issues concerning the individuals in the classifications of carpenter foreman and laborer foreman before the election was conducted. Therefore, consistent with Section 102.64 of the Board's Rules and Regulations, I direct an election in this matter, and I further order that the individuals in the classifications of carpenter foreman and laborer foreman may vote in the election, but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

The construction industry eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), and *Steiny & Co.*, 308 NLRB 1323 (1992) applies to all employees in the construction industry.¹³ In *Steiny*, the Board held that the construction industry eligibility formula applies to all construction industry elections unless the parties stipulate not to use it. *Steiny*, supra at 1327-28 and fn. 16. Here, it is undisputed that the Employer operates in the construction industry. Further, the parties have not stipulated to waive the *Daniel/Steiny* formula. Accordingly, I find that the *Daniel/Steiny* formula is applicable to this case.

III. Conclusions and Findings

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

group with common interests distinguishable from those of other employees. *Id.* As explained above, especially regarding the community-of-interest factors, I find that the petitioned-for employees meet that standard.

¹³ At hearing, the Employer made an offer of proof that the *Daniel/Steiny* formula should not apply in this case. Following the receipt of the offer of proof, I reviewed it to determine if the offer was sufficient to sustain the Employer's position, which is that the formula is arbitrary and capricious and should be overruled, and that, if given the opportunity, the Employer would rebut the presumption of eligibility for such employees qualifying for eligibility under the formula. I rejected the Employer's offer of proof at hearing, and I adhere to my conclusion.

3. The Joint Petitioner is comprised of labor organizations, each of which is a labor organization within the meaning of Section 2(5) of the Act, and it claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time laborers and carpenters employed by the Employer in the greater Washington, D.C. metropolitan area, excluding all cement masons, cement mason foremen, operators, drivers, helpers, welders, line and grade instrument men, office clerical employees, managerial employees, professional employees, guards, and supervisors as defined by the Act.

OTHERS PERMITTED TO VOTE: At this time, no decision has been made regarding whether laborer foremen and carpenter foremen are included in, or excluded from, the bargaining unit and individuals in those classifications may vote in the election but their ballots shall be challenged since their eligibility has not been resolved. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

IV. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by United Construction Workers Local Union No. 202-Metropolitan Regional Council of Carpenters.

A. Election Details

I have determined that a mail ballot election will be held. Mail balloting may be used in certain circumstances, such as where the eligible voters are scattered because of their duties or work schedules. In such situations, I may conduct an election by mail ballot, taking into consideration the desires of the parties, the ability of voters to understand mail ballots, and the efficient use of personnel. *San Diego Gas & Electric*, 325 NLRB 1143 (1998). The Employer's current employees are scattered over approximately 17 worksites in the Washington, D.C. metropolitan region, including at Fort Meade, Maryland. I have determined that the Employer's request for a manual election with two one-hour sessions at a downtown Washington, D.C. location, or at two of its jobsites, insufficiently accommodates the approximately 325 employees the Employer represents to be currently employed in the petitioned-for unit, plus those individuals eligible to vote under the *Daniel/Steiny* formula, and the carpenter foremen and laborer foremen voting under the Board's challenged ballot procedure. I conclude that the Employer did not present me with any viable alternatives to conducting the secret ballot election by mail ballot, nor any basis for concluding otherwise. Given the lack of proximity to the

proposed manual balloting site, plus the fact that there are an unknown number of employees eligible to vote under the *Daniel/Steiny* formula, I find it questionable whether the Employer's proposal would allow the employees the ability to exercise their right to vote in the election.

The direction of a manual election in Case 05-RC-135621 involving the Employer's cement mason employees and foremen does not require a manual election in this case. There, the parties—including a petitioner not a party to the instant case—agreed to a manual election for approximately 34 eligible voters, thereby obviating the need for the Regional Director to determine the method of election. Here, however, the parties take adverse positions concerning the method of election and have been unable to agree on the method of election for a unit significantly larger than that in Case 05-RC-135621. As explained above, based on the circumstances in this case, I have determined that a mail-ballot election is most likely to maximize eligible voter participation in this case.

The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 3:00 p.m. on Friday, June 5, 2015, ballots will be mailed to voters from the National Labor Relations Board, Region 5, Bank of America Center, Tower Two, Suite 600, 100 South Charles Street, Baltimore, Maryland 21201. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and do not receive a ballot in the mail by June 12, 2015, should communicate immediately with the National Labor Relations Board by calling the Baltimore Regional Office—collect, if necessary—at 410-962-2822.

All ballots will be commingled and counted at the Baltimore Regional Office on Friday, June 26, 2015, at 3:30 p.m. In order to be valid and counted, the returned ballots must be received in the Baltimore Regional Office, prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date, or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election. Thus, laborer foremen and carpenter foremen are eligible to vote using the Board's challenged ballot procedure.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters. The Employer must also include in a separate section of that list the same information for the laborer foremen and carpenter foremen who, according to this direction of election, will be permitted to vote subject to challenge.

At hearing, the Employer requested an extension for the period of time in which it was required to provide the list, from a 2-day period to a 7-day period. The Employer claimed at hearing that it was impracticable for an employer in the construction industry to produce the required list in a 2-day timeframe. The Employer did not elaborate on this issue, nor did it make an offer of proof. I deny the Employer's request. The petition was filed and served on the Employer on April 14, and the hearing was held on April 30. I consider that the Employer has had ample time to compile the required list.

To be timely filed and served, the list must be *received* by the regional director and the parties by Tuesday, May 26, 2015. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

The parties have stipulated that the Employer may produce the voter list as a Microsoft Excel file, and that stipulation was received and accepted. The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting, and likewise shall be estopped from objecting to the non-distribution of notices if it is responsible for the non-distribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

V. Right to Request Review

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Re: Baker DC, LLC
Case 05-RC-150123

May 21, 2015

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

(SEAL)

Dated: May 21, 2015

/s/ Charles L. Posner

Charles L. Posner, Regional Director
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